No. 87-1279

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,

Appellant,

—v—

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AMICUS CURIAE IN SUPPORT OF APPELLANT

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MOTION OF CENTER FOR CONSTITUTIONAL RIGHTS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Center for Constitutional Rights, a not-for-profit organization, hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. The oral consent of all parties has been received. (Telephonic consent has been received

from Alexia Morrison, Esq., appellant; Thomas S. Martin, Esq., counsel for appellee Olson; Jacob A. Stein, counsel for appellee Dinkins; and Brendan Sullivan, counsel for appellee - Schmults.) However, due to the expedited nature of this appeal and the restricted amount of time for securing the consents, those consents have not been received in writing.

The interest of amicus arises from its commitment to the enforcement of constitutional rights and to the representation it has provided over the past two decades to individuals and organizations attempting to hold public officials accountable for violations of constitutional rights. Movant believes there is no more important principle which underlies the Constitution of the United States than that of official accountability under law. It believes

that the brief it submits herewith will assist the Court in establishing that the opinion of the majority in the Court below was seriously flawed in its affirmance of unconstrained Executive power, and, if upheld, would jeopardize this nation's 200-year old commitment to the rule of law.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AMICUS CURIAE IN SUPPORT OF APPELLANT

In this action, Alexia Morrison, independent counsel, appeals from a final judgment of the United States Court of Appeals for the District of Columbia Circuit, dated January 22,

1988, which held the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. Sec. 49, 591 et seq., contravene the Appointments Clause of the Constitution, Art. II, Sec. 2, cl. 2, the separation of powers principle and the limitations of Article III. (The Opinion of the Court of Appeals is printed in the Appendix to the Jurisdictional Statement beginning at 1a. All references to that opinion will be to that Appendix.)

INTEREST OF AMICUS CURIAE

The Center for Constitutional Rights, a non-profit organization, was founded in 1966 to serve the Southern civil rights movement. It has a history of providing pro bono legal services to individuals and groups on some of the most important ethical, moral and legal issues of our times -- racial justice, women's rights, international human rights, First Amendment freedoms, criminal justice and government misconduct.

The Center is dedicated to applying the letter and spirit of the Constitution to the unfolding struggle for human freedom. For two decades it has been in the forefront of providing vigorous legal support to individuals and social movements whose constitutional rights have been infringed upon

or denied. Its attorneys have argued some of the major constitutional cases before this Court over those two decades, including United States v. United States District Court of the Eastern District of Michigan, 407 U.S. 297 (1972), which affirmed the principle that no one in this country is above the law.

The Center is firmly committed to enforcement of the rule of law and the accountability of public officials for their public actions. For that reason, it advocates the independent counsel provisions of the Ethics Act since they respond to a demonstrated need to alleviate the inherent conflict of interest that arises when investigation or prosecution of high level executive officers is undertaken. The Center for Constitutional Rights, as amicus

curiae, files this Brief in support of the constitutionality of the independent counsel provisions of the Ethics in Government Act.

SUMMARY OF ARGUMENT

The independent counsel provisions of the Ethics in Government Act are consonant with both the policy of the Constitution and the structure that it implements. The democratic system by which the United States is governed requires accountability at all levels of government. It is premised on the notion that "no man is above the law." This statute assures that all those who govern are subject to the laws of the land, by providing that in those limited situations where the prosecutorial function is at risk of being tainted by patent conflicts of interest

on the part of the President and Attorney General that function is temporarily assigned to a surrogate. By assuring executive accountability, these provisions of the Act maintain the qualities which distinguish this country from a monarchy and nurture the essential propositions of our democracy.

The process of appointing this special officer is governed by the system of checks and balances. It is harmonious with one hundred years of case law which elucidates the Constitutional mandates for exercise of the appointment power. The doctrine of separation of powers does not prohibit Congress from vesting the appointment power for independent counsel in the judiciary. Because independent counsel are "inferior officers," the designa

tion of the appointing power is, by the specific terms of the Constitution, a matter resting in the discretion of Congress. The judicial appointment of the independent counsel is expressly authorized by the appointments clause and is precisely defined to provide a balanced response to executive overreaching that could place our democratic system of government in jeopardy.

The partial autonomy of independent counsel does not conflict with the President's duty to faithfully execute the laws. In fact, that duty is not an unbounded grant of authority, but rather is language of limitation. It does not mandate absolute control over all prosecutions and is not intended to immunize high government officials from prosecution.

Finally, zealous prosecution of those entrusted with the governance of the United States does not offend their rights as defendants. Neither theory nor practice provides reasons to believe independent counsel are either unscrupulous or single-mined in a quest for conviction. They are invariably reputable and responsible lawyers who have undertaken pivotal duties at critical times in this country's history at the behest of equally responsible members of the federal judiciary. They perform their special and limited duties only after the Attorney General has conducted a preliminary investigation and has determined that there are reasonable grounds to warrant further investigation of possible wrongdoing by high government officials. Furthermore,

independent counsel are subject to removal for good cause by request from the Attorney General.

And while infringing no rights of putative defendants, the independent status of the special prosecutor assures "even the most cynical members of the public and press that allegations against high level officials will always be examined fairly and objectively." The Special Prosecutor Provisions of the Ethics in Government Act of 1978, 36 Record of the Association of the Bar of the City of New York, 421, 429 (1981).

ARGUMENT

I. THE INDEPENDENT COUNSEL PROVISION IS ONE OF THOSE "AUXILIARY PRECAUTIONS" THE FOUNDERS RECOGNIZED AS NECESSARY TO ASSURE THE PUBLIC ACCOUNTABILITY OF PUBLIC OFFICIALS

James Madison wrote in The Federalist, that "[i]f men were angels, no government would be necessary." Similarly, "if angels were to govern men, neither external nor internal controuls on government would be necessary." But he continued:

> In framing a government which is to be administered by men over men the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government: but experience has taught mankind the necessity of auxiliary precautions.
>
> [The Federalist, No. 51 at 322 (Rossiter Ed., 1961)].

Foremost among those "auxiliary precautions" was a constitutional

scheme of checks and balances which assures that "No man in this country is so high that he is above the law... All officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." United States v. Lee, 106 U.S. (16 Otto) 196, 220 (1882). Cf. United States v. United States District Court of the Eastern District of Michigan, 407 U.S. 297 (1972).

It was the Founders' insistence that in our system, unlike the British model from which it evolved, all public officials be accountable under the law which led an early Supreme Court to declare, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." Marbury v. Madison, 1 Cranch 137 163 (1803).

This notion was recently reiterated in this, the 200th year of the Constitution, by Select Committees of both houses of Congress, which declared: "The idea of monarchy was rejected here 200 years ago and since then the law -- not any official or ideology -- has been paramount." Report of the Congressional Committees Investigating the Iran-Contra Affair, 100 Cong., 1st Sess., Nov. 1987, at 22.

Thus, it was perfectly appropriate for the Congress, in the wake of the trauma of Watergate and the notorious "Saturday Night Massacre" to provide for the appointment of independent counsel to investigate and prosecute criminal wrongdoing by high executive officers free of the taint of self-

protective executive supervision.[1]

To suggest, as did the Court below, that the chief executive, who possesses an unlimited power of pardon in regard to all offenses against the federal government, United States Constitution, Article II, Section 2, was also assigned an uncontrollable supervision over his own and his immediate subor

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[1]As succinctly stated by Judge Ginsburg in her dissent below:

> The Ethics Acct is designed to function as a control against abuse of executive branch power, It implements the checking aspect of the separated powers. The independent counsel provisions of the Act were developed in response to the Watergate era abuses of executive branch powers, abuses which themselves threatened the balance between the three branches of government. The Act is rooted in the principle that "no man can be a prosecutor or judge in his own case." S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977), reprinted in 1978 U.S. Code Cong. &. Adm. News 4216, 4221. (110a.)

inates' accountability, is to make a mockery of the principle of checks and balances. Nothing in either the letter or spirit of our basic charter requires such an anomalous result.

II. THE AUTONOMY OF INDEPENDENT COUNSEL DOES NOT CONFLICT WITH THE PRESIDENT'S DUTY TO FAITHFULLY EXECUTE THE LAWS

The Constitutional command that the Executive "take care that the laws be faithfully executed", Art. II, Sec. 3, is not an unbounded grant of power; it is language of limitation.[2] It serves

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[2] See, eg., Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Power, 63 B.U.L.Rev. 69, 90 (1980):

> Indeed the Framers probably included the "faithful execution" clause in the Constitution to limit, not expand, the President's power. The clause was intended to rule out any power

as a constitutional reminder of the centuries long struggle in England against the insistence by absolute British monarchs that the King could decide for himself which laws were or were not to be obeyed. See dissent below at 110a, n. 26. In the instant case, the Executive seeks to use this mandate to faithfully execute the laws as a shield against that very same command. But since ours is a "government of laws, and not of men" Marbury v. Madison, supra, 1 Cranch at 163, officials in high places cannot be allowed to immunize themselves or their subordinates from prosecution.

> for him to dispense with, or suspend the execution of the laws. Thus, the President may not always have the power to direct the execution of the laws, but merely a duty to do so when the laws have not excluded his direction.

High level executive officers are immunized if this Court accepts the holding of the majority below that law enforcement, like foreign affairs, is one of "two core domains of Presidential responsibility," 53a, and, therefore, beyond the reach of independent auditors. However, as the dissent aptly points out, "[i]t is not obvious that prosecution is at the 'core' of the executive branch's constitutionally-assigned functions, in the sense that the job must be kept, in any and all cases, under the President's wing and cover." 108a.

While Art. II, Sec. 2 makes it clear that the President has a central role in foreign affairs, is Commander-in-Chief of the armed forces, makes treaties and receives ambassadors, no mention is made of law enforcement

duties. Although the executive powers are not limited to those enumerated in the Constitution's text, if the Framers considered law enforcement to be a "core" function, it is likely that it would have been listed along with the executive's other central responsibilities. See e.g., The Federalist No. 72 at 435-36 (A. Hamilton) (Rossiter edition, 1961) (Hamilton enumerated executive functions without mentioning law enforcement).

In fact, the Constitution makes no mention of the functions which an Attorney General or Department of Justice might perform since neither seems to have been anticipated by the Framers. Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform, 50 N.Y.U.L Rev. 366, 387 (1975) (hereinaf-

ter "Removing politics"). In view of their delineation of other substantive areas for executive administration, the Framers' failure to assign justice functions might suggest that they could not decide which branch of government would enforce and administer them. Id.

The office of Attorney General was not established until the Judiciary Act of 1789, and the Department of Justice was not created until 1870. Id. at 369. Coupled with the decentralized nature of prosecution during the Federalist period and the absence of textual reference in the Constitution, the majority below lacks support in referring to prosecution as a core executive function.

Further, the concept that a "unitary executive" guarantees accountability, See Opinion below at 27a, fails where

the President himself or his top aides are the target of investigation or prosecution. The majority below asserts that "[f]or no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official -- the President -- than in the prosecution of criminal laws." 27-28a. This rationale crumbles, however, when the Chief Executive or his high level appointees are the subject of investigation. "[U]nless there are some limits to executive control of the mechanisms for law enforcement, the concept of accountability could be circumvented by a corrupt executive intent upon obstructing the machinery of justice and the operation of the political process."

The Proposed Court-Appointed Special

Prosecutor: In Quest of Constitutional Justification, 87 Yale L.J. 1692, 1692-93 (1978).

If the highest levels of the executive branch are to be truly accountable to the people, it is essential that the necessary investigations will be made and the requisite information will reach the public. Id. at 1695. "If the executive branch is not to be insulated from the pressures of the political system, the prosecutor must be free of executive control during his investigation of alleged corruption." Id.

"Appointment by the President would promote public suspicions that the prosecutor lacked independence to investigate and prosecute members of the incumbent Administration." Removing Politics at 432. That

perception, rather than promoting accountability, would foster the belief that the President was above the law.

The relevant decisions of this Court support the assertion that limitations on the Executive's authority to discharge the independent counsel ("only for good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of such independent counsel's duties," 28 U.S.C. 596(a)(1) do not violate the principle of separation of powers. In both Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Weiner v. United States, 357 U.S. 349 (1958) this Court upheld congressional authority to impose limitations on the removal power of the President, because the nature of the function exercised by the officials

required exercise of independent judg ment. The same analysis demands that independent counsel must not be subject to removal-at-will by the President, for as the District Court found,"be-yond peradventure the very purpose of the office requires a degree of independence from Presidential con-trol". In Re Sealed Case, No. 87-0197 (July 20, 1987) 138a.

The majority below posited that prohibiting the Attorney General from removing the independent counsel except for good cause "makes executive power a mere mockery." 69a. In postulating this expansive Presidential power, the Court relied almost exclusively on Myers v. United States, 272 U.S. 52 (1926), and reduced the more contem-porary case of Weiner v. United States, 357 U.S. 349 (1957), to a mere foot

note. But Weiner specifically ac knowledged Congress' power to create an office serving an executive function that was free from "the Damocles' sword of removal by the President." Id at 356. Cf, United States v. Nixon, 418 U.S. 683, 694-95, n.8 (1974), rejecting the President's attempt to restrict the autonomy of the special prosecutor as conferred by regulation promulgated by the Attorney General.

The reasoning of the majority below discards half a century of legal developments. This Court in the past has carefully protected Congress' right to create an inferior executive office free from coercive influence. To destroy what this Court has done merely because it "mocks executive power" would be to create an Imperial Presidency which the Framers so eagerly

sought to avoid and to destroy the accountability which a "unitary executive" was designed to nurture.

III. THE DOCTRINE OF SEPARATION OF POWERS DOES NOT PROHIBIT CONGRESS FROM VESTING THE APPOINTMENT POWER IN THE JUDICIARY

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952). (Jackson, J., concurring).

Article II, Sec. 2, cl.2 of the Constitution indisputably gives Congress the discretion to vest the power to appoint inferior officers "in the President alone, in the Courts of

Law, or in the Heads of Departments." The majority below rested its decision on its finding that independent counsel are superior officers because "[t]he magnitude of the task... is constitutionally determinative." 23a. Because the independent counsel's responsibilities and powers are circumscribed both functionally and temporally, the majority opinion below flies in the face of one hundred years of precedent as well as the express language of the appointments clause.

In 1879, this Court identified inferior officers as "officers inferior to those specially mentioned [in the Appointments Clause]." United States v. Germaine, 99 U.S. 508, 509-10 (1879). Clearly, independent counsel are inferior officers by this standard.

Furthermore, a functional analysis

reveals that the powers and duties delegated under the Ethics in Government Act are carefully limited. First, the independent counsel is subject to removal by the Attorney General for good cause, 28 U.S.C. Sec. 596(a)(1), or by the special court if it determines his investigation is either complete or fruitless. 28 U.S.C. Sec. 596(c)(2). Second, he must comply with the policies of the Department of Justice concerning enforcement of the criminal law. 28 U.S.C. Sec. 594(f). Third, his prosecutorial jurisdiction is narrowly circumscribed. 28 U.S.C. Sec. 594(a). Fourth, appropriate Congressional committees must be kept abreast of his activities. 28 U.S.C. 595(d). Finally, he must advise the House of Representatives of "substantial and credible information" that may

constitute grounds for impeachment. 28 U.S.C. Sec. 595(c). Thus, functionally, independent counsel are subject to significant, structured limitations on their power.

A temporal analysis has also been used by this Court to ascertain whether a particular office is superior or inferior. In 1898, this Court declared:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

United States v. Eaton, 169 U.S. 331, 343 (1898) (Vice-Consul remains an "inferior officer" even when he

replaces the Consul).

Finally, this Court itself has labeled a similar office as being inferior. In United States v. Nixon, 418, U.S. 683 (1974), the Court stated that Congress may vest in the Attorney General the power "to appoint subordinate officers to assist him in the discharge of his duties." Id at 694 (emphasis added). A ruling today by this Court that independent counsel are superior officers whose appointment requires nomination by the President with the advise and consent of the Senate effectively overrules Nixon. If he be subordinate when appointed by the Attorney General, an independent counsel exercising the same functions does not become superior when appointed by a panel of judges.

In keeping with the Constitutional

scheme, the Ethics Act bifurcates the appointment process for independent counsel, giving the executive and judicial branches indispensible roles. The appointment must be initiated by the Attorney General, who applies to the Special Division of the Court of Appeals. 28 U.S.C. Sec. 591(b), (c). The Special Court has no unilateral power. It cannot act until the Attorney General requests the appointment. And the Attorney General's refusal to seek appointment is unreviewable. Nathan v. Smith, 737 F.2d 1069 (D.C.Cir. 1984); Banzhaf v. Smith, 737 F.2d 1167 (D.C.Cir. 1984). Cf. Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986). Except for the selection of the specific person who will fill the temporary role of independent counsel, the appointment process is

entirely under executive control.

Congress exercised its Art. II, Sec. 2 authority for the first time in 1789 when it vested in the district courts the power to appoint (and discharge) the clerks of the court. this Court sustained this exercise of power, noting in dictum that the power to vest the appointment of inferior officers in either the President alone, the Courts of Law, or Heads of Departments implied that the power would be delegated "to the department of the government to which the officer to be appointed most appropriately belongs." That fit the situation before the Court, as "the appointment of clerks of courts properly belongs to the Courts of Law." Matter of Hennen, 38 U.S. 230, 258 (1839). While the appointment in Hennen was clearly intrabranch in

nature, fifty years later this Court upheld the judicial appointment of officers who served an executive function, noting an absence of incongruity in the judicial appointment. Ex Parte Siebold, 100 U.S. 371, 397-98 (1880). The same result was stated in Go-Bart Co. v. United States, 282 U.S. 344 (1931), when this Court emphasized the Congressional power to vest in the Courts of Law authority to appoint officers whose mandate includes "prosecution under laws relating to the elective franchise and civil rights." Id. at 353 n.2.

The lower federal courts have implemented these holdings. They have sustained the authority of Congress to vest in the Courts of Law the power to appoint magistrates (who, with the consent of the parties decide federal

cases with status equal to the judges appointed by the President), Pacemaker Diagnostics Clinic of America v. Instromedix, 725 F.2d 537 (9th Cir. 1984). They have sustained the authority of Congress to vest in the Courts of Law the power to appoint interim United States Attorneys (with full power to prosecute all cases) whenever a vacancy should occur. United States v. Solomon, 216 F.Supp. 835 (S.D.N.Y., 1963). They have sustained the authority of Congress to vest in the Courts of Law the power to appoint the members of the District of Columbia school board. Hobson v. Hansen, 265 F.Supp. 902 (D.D.C. 1967). Thus, interbranch appointment need not be incongruous, especially where, as here, the appointment power cannot be exercised unilaterally and is clearly

fashioned to preclude the inherent conflict of interest or appearance of impropriety which would otherwise inhere in the appointment by the executive of a surrogate to investigate the executive.

Contrary to the majority's assertions in the court below, the Ethics Act does not unconstitutionally withdraw the prosecutorial power from "the cognizance of the branch to which it is constitutionally assigned." 59a, (quoting Commodity Futures Trading Commission v. Schor, ___ U.S. ___, ___, 106 S.Ct. 3245, 3260 (1986)). Rather, the Act responds to the pressures generated by a narrow category of circumstances where the object of the investigation is the conduct of a highly placed executive branch official.

Once the independent counsel is

appointed, the Act carefully provides for his independence from both the executive and judicial branches. The result is a narrow and circumspect "siphoning" of power from one branch without its parallel vesting in another. "[T]he full range of structural values encompassed under the heading of separation of powers," dissent at 104a, is scrupulously preserved, thereby avoiding the "aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). The only diminution of power is the diminution of the executive power to thwart investigations or prosecutions against itself. Appellee's contention that the entire prosecutorial function vests absolutely in the executive is all too opportunistic.

It was the Framer's intent that separation of powers in three co-equal branches of government serve as a check against tyranny. The Framers were well aware that government power is subject to abuse and that the "danger of tyranny or injustice lurk[s] in unchecked power..." K. Davis, Administrative Law Text, Sec. 1.09 at 30 (1972) (emphasis added). By refusing to vest unlimited powers in any one branch of government, the Framers intended that each branch serve as a bulwark against the unlimited exercise of power by the others.[3]

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[3]Alexander Hamilton noted that one of the purposes behind the diffusion of the appointment power in Art. II, Sec. 2 was the need to obviate a "spirit of cabal and intrigue" and to ensure that the President would not select only those whose "insignificance and pliancy will render them the obsequious instruments of his pleasure." The Federalist No. 76, at 455, 458 (Ros-

The Framers conceived separation of power as a means of implementing a system of checks and balances. To ignore this essential connection and to "hermetically seal," Buckley v. Valeo, supra, 424 U.S at 121, the prosecutorial function in the executive branch is to ignore the fundamental reason for a government of separated powers. "[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." The Federalist No. 48 at 313 (Madison, J.) (Rossiter edition 1961). Indeed, as the dissent below stated, there is "irony in the majority's

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siter edition, 1961).

holding that the Act is constitutionally infirm" because it violates separation of powers when the purpose of the Act is to "maintain the structural design that is the genius of our Constitution -- the system of mutual checks and balances." 89a.

The Ethics Act is a balanced response to executive overreaching that has placed our democratic system of government in jeopardy. Under the guise of separation of powers, appellees advocate a return to a rigid compartmentalization which would defeat checks and balances in order to shield the executive branch from outside scrutiny. The court below contends that "the founders chose to risk the potential for tyranny, inherent in placing power in one person, in order to gain the advantages of account-

ability fixed on a single source." 27a (quoting Sierra Club v. Costle, 657 F.2d 298, 405 (D.C.Cir. 1981)). Appellees, moreover, would have us both risk tyranny and forego accountability. Since accountability is rendered meaningless unless "the citizenry... possess[es] the information on which accountability depends, a suspect executive must not be allowed to obstruct processes that may yield damaging allegations." Note, The Proposed Court-Appointed Special Prosecutors: In Quest Of A Constitutional Justification, 87 Yale L.J. 1692, 1699 (1978).

By insulating the executive branch from the principle of accountability, the Court promotes the very executive imperialism rejected by the Framers, who constructed a government designed

to safeguard against tyranny.

An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restricted by the others.

Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted in The Federalist, No. 48, at 310-11(Rossiter edition 1961) (emphasis added).

The Ethics Act is a response to the problem of unchecked executive lawlessness and the threat it poses to the basic structural design of our democratic system. "In a government of laws, existence of the government will be imperilled if [the government] fails to observe the law scrupulously." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J.,

dissenting).

By addressing the obvious need to insure conscientious executive observance of the law while recognizing the reluctance of the executive to bring prosecutions against itself, the Ethics Act creates a bulwark against tyranny and furthers our system of checks and balances.

IV. HYPOTHETICAL FEAR OF OVER-ZEALOUS AND UNSCRUPULOUS PROSECUTORS DOES NOT RENDER THE LAW UNCONSTITUTIONAL

The Court below painted a picture of independent counsel as unscrupulous bounty hunters, driven, in their desire for fame and profit, into overzealous pursuit of their prey. That portrait is both unfair to the dedicated and responsible lawyers who have been selected for this important public service and is unsupported by the real

history of the law's application.

Independent counsel are carefully chosen by a panel of three federal appellate judges who are, themselves, selected by the Chief Justice of the United States.

Under the Ethics in Government Act, appointment of nine independent counsel has been publicly requested by the Attorney General to investigate executive branch officials accused of wrongdoing. In most of these cases, no prosecution has resulted. In only two of the investigations to date have indictments been returned: Franklin C. Nofzinger and Michael K. Deaver were separately convicted of improper lobbying activities after leaving important executive branch positions. Four investigations have been closed

without prosecution.[4]

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[4]On November 19, 1979, Arthur H. Christy was appointed to investigate allegations of cocaine use by Presidential Chief of Staff Hamilton Jordan. On May 28, 1980, Christy issued a report vindicating Mr. Jordan. On Sept. 9, 1980, Gerald J. Gallinghouse was appointed to investigate the use of illicit drugs by Presidential Counselor Timothy E. Kraft. On Jan. 18, 1971, Mr. Gallinghouse issued a report recommending against further investigation. On Dec. 29, 1981, Leon Silverman was appointed to investigate charges of corruption against Secretary of Labor Raymond J. Donovan; that commission was later broadened to include an investigation of perjury. On June 28, 1982, Mr. Silverman filed his report vindicating the Secretary. On April 1, 1984, Jacob A. Stein was appointed to investigate allegations of financial improprieties by then Presidential Counselor Edwin A. Meese III. On Sept. 20, 1984, Mr. Stein filed a report concluding there was no basis for criminal prosecution.

Three investigations are still pending, including the one giving rise to this case. On Dec. 19, 1986, Lawrence E. Walsh was appointed to investigate matters arising out of the Iran-Contra Affair. In 1987, Mr.McKay, who supervised the successful prosecution of Mr. Nofziger, had his jurisdiction broadened to include allegations against Attorney General Meese.

The attorneys who have been appointed as independent counsel have all been well-established, experienced attorneys. They have included former United States Attorney Whitney North Seymour, Jr., who was selected to conduct the investigation of Deaver; and Judge Lawrence E. Walsn, who was appointed special counsel to investigate Oliver L. North and related matters in what has come to be know as the Iran-Contra affair.

These carefully chosen, distinguished lawyers hardly represent the kind of "loose cannons" suggested by the majority below. On the contrary, the independent counsel have invariably been selected because they already possess the substantial reputation and the requisite integrity and disinterestedness that will permit a decision not

to prosecute to be viewed by the public as a justifiable determination and not as a cover-up.

Speculative and hypothetical fears that an unscrupulous prosecutor may someday over-reach in a single-minded quest for fame and glory, See majority op. at 70-74a, is an insufficient basis upon which to invalidate an important public regulation. As this Court has held, "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). Nor is there any reason to believe that should the worst-case scenario arise, the rights of a criminal defendant would not be adequately protected by the judiciary, "whose duty it is to make the final decision and whose impartiality serves

as the ultimate guarantee of a fair... proceeding in our constitutional system." Id. at 250.

CONCLUSION

It is a truism that power corrupts; hence our constitutional system of checks and balances and the separation of powers among the coordinate branches of government. Additional prophylactic measures are essential to prevent abuse of power for personal gain; hence the Independent Counsel, to preserve integrity on high, to satisfy the governed that those who govern deserve our continued trust.

The decision of the Court below should be reversed and the constitutionality of the independent counsel provision of the Ethics in

Government Act should be affirmed.

Respectfully submitted,

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